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HANDBOOK OF THE LAW OF TORTS, by  
William L. Prosser. West Publishing Co., St. Paul,  
1941. Pp. xiii, 1309. \$5.00.

William L. Prosser

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complications that he leaves unexplored. What, for example, of the political and economic problems incident to the transition to the new order? Again, would his highest court function as has the United States Supreme Court in maintaining the supremacy of the union constitution and in "umpiring the federal system"? But his work has not been without significance. His concern has been chiefly with winning the peace—something we did not do after the last war. His outlook is hopeful and courageous; he refuses to accept the attitude of almost cynical futility that experience since the last war has planted in the minds of some disillusioned erstwhile internationalists. And he scores some good points in contrasting the magnificent possibilities of a unified international society with the ingrown, retrogressive aspects of nationalism. In short, his book has its provocative phases and it is addressed to the most vital problem of our times.

As annexes to the volume Mr. Streit appends drafts of an illustrative declaration of inter-dependence and union and an illustrative constitution. Adequate comment upon them would require an essay.

JEFFERSON B. FORDHAM\*

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The annual meeting and barbecue of the National Union of Torts Scholars, more popularly known by its initials, was held last night at the Odd Fellows Hall. With the assistance of the police, the meeting was called to order, with PROFESSOR WARREN A. SEAVEY, of Harvard, occupying the chair.

THE CHAIRMAN announced that the subject for discussion was the text which had recently appeared, written by Professor William L. Prosser of Minnesota, and entitled "A Handbook of the Law of Torts." He might venture the comment that this was something of a misnomer, as the book was not very well adapted to carrying in the hand without imminent peril to the toes. (Laughter). It had been published by the West Publishing Company, the well-known law book corporation of St. Paul, was handsomely bound in fabrikoid of a beautiful Harvard crimson with real gold lettering, and was printed throughout in very

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\* Professor of Law, Louisiana State University.

legible type and sold for the ridiculously low price of five dollars. The book contained numerous citations of cases, he had forgotten the precise number, and also references to many articles in legal periodicals written by members of this group, which might be expected to insure it favorable consideration on their part. Through the courtesy of the publishers, who were known for their generosity, complimentary copies had been sent to all of the leading Torts teachers of the country— (A VOICE: Not all of them) —and he had no doubt that some of those present had read the book. The meeting was open for discussion.

PROFESSOR LAURENCE H. ELDREDGE, of Pennsylvania, was recognized by the Chair. He said that he had read the book, or at least had read some parts of it, enough to enable him to form an opinion of the rest. He had only a casual acquaintance with Mr. Prosser, but he recalled that he had once seen an article of his in either the Minnesota or the Mississippi Law Review, and so might say that he was familiar with his work. Mr. Prosser was a young man of some promise, whose writing was not without a certain merit, and in the course of time he might be expected to learn a great deal about the law of Torts. This book, however, displayed what he might call a deplorable midwestern attitude, in that it failed to accord to the decisions of the Supreme Court of Pennsylvania, to say nothing of those of the other Pennsylvania courts, that preëminence which they rightfully occupied in American Tort law. He felt that some one should protest against this; Pennsylvania was a little state, but there were those who loved it. Still more reprehensible were the aspersions occasionally cast upon the Restatement of the Law of Torts, which, he might say with some modesty, was the most admirable piece of work yet done in this field. The author actually went so far as to question whether certain sections of the Restatement were supported by authority—as, for example, on page 647 of the text, where he unblushingly challenged the validity of the Restatement, Section 366, to the effect that a vendee of land assumes responsibility as to conditions which are not latent from the moment he takes possession, regardless of knowledge of the danger or opportunity to guard against it. That section, he might add, was supported by a clear dictum in *Palmore v. Morris, Tasker & Co.*, 182 Pa. 82, and the twenty or thirty cases to the contrary, headed by *Penruddock's Case* in 1598, were all to be distinguished upon the very obvious ground that they involved nuisances upon the land. The text was therefore definitely wrong.

He might multiply illustrations, but surely enough had been said to indicate the unreliability of the book.

The style of the author appeared to him excessively dogmatic and didactic. In his opinion, too much reliance had perhaps been placed upon legal periodical literature. Doubt might be expressed whether articles in the *Rocky Mountain Law Review*, the *Michigan Law Review*, the *Florida State Bar Journal* and all such similar publications were worth citing. There was an exception, of course, in the very distinguished writings of Professor Francis H. Bohlen, an authority so outstanding that anything he wrote must be taken as the final word on the subject.

He thought that he detected throughout the book a pronounced bias in favor of the plaintiff, which was to be deplored. The treatment of the tort liability of a landlord was scarcely adequate, and if the author really believed that the lessor of even a small shop or a doctor's office open to the public became responsible for its condition at the time of the lease, that was going too far. What was said about trespassers on railway tracks was entirely too favorable to the trespasser, who after all was a wrongdoer with no business there, and should be required to stay off. The author was much too willing to place upon the retail seller the duty of inspecting goods purchased from the manufacturer, and should be referred to a good article in the *University of Pennsylvania Law Review*. He noted with some regret that Mr. Prosser seemed to approve the decision in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, holding that the radio broadcaster was not liable for interpolated defamation—a decision which might be said to be the one blemish on the record of an otherwise spotless jurisdiction. He thought also that the views expressed as to the intentional infliction of mental suffering were not entirely supported by the cases cited, some of which involved actual physical injury. The treatment in Chapter VIII of the topic of proximate cause— (Disturbance in the hall. After an interval quiet was restored) —were, he believed, fallacious; they failed to realize the extent to which the whole problem was one of whether the conduct of the defendant was a substantial factor in bringing about the harm to the plaintiff, and the various rules set forth by the Restatement were merely guides toward arriving at that conclusion. On the whole an interesting book, which he was glad to see, and which the lawyer would do well to keep on his shelf.

PROFESSOR FOWLER V. HARPER, of Indiana, said that he was

very glad indeed to welcome a new text in the field of Torts. He was reading the book, and had got as far as Chapter II. He agreed in all respects with what had been so well said by Professor Eldredge. He believed that the book had many good points, but that it failed to do justice to the Pennsylvania cases, or, what amounted to the same thing, the Restatement of Torts, which he regarded as the finest and most original enunciation of Tort theory available. He agreed that there was perhaps too much reference to periodical literature. Some one had said that there were only two writers on Torts whose articles were worth citing; and Professor Bohlen was certainly one of them. Beyond this, it might be that there were far too many cases cited. He questioned whether it was desirable, in legal writing, to annoy the reader with an excess of citation, as it only tended to confuse him. Tort theory was more important than Torts cases. One case which was right, that is to say one which agreed with the Restatement, was worth forty to the contrary. It was the function of a text writer to shed light and not to intensify fog. Mr. Prosser's role seemed to him that of a fogshedder. Glancing ahead through the book, he had been pleased to observe that the author had taken the proper position with reference to the duty to control the conduct of another, recovery for mental suffering, the synthesis of the law of misrepresentation, and the subject of proximate cause—(Renewed disturbance. Quiet was restored) —he meant proximate cause in relation to liability without fault. But all of these topics had been dealt with better elsewhere. On the whole a useful book and a valuable addition to the field, although he believed that better texts on the subject had been written within the last decade.

DEAN LEON GREEN, of Northwestern, said that he had read as much of the book as his health permitted. Far from objecting to the author's aspersions upon the Restatement, he deplored the fact that it had frequently been referred to, and even cited with apparent approval. He would not say that the Restatement of Torts was a sticky mess— (Uproar, and demands that the statement be withdrawn). He would *not* say that the Restatement was a sticky mess— (Renewed uproar. A fight broke out in the rear of the room, and an unidentified delegate from Columbia was ejected from the hall). He repeated, he would *not* say that the Restatement was a sticky mess, but he would say that it was open to criticism and disagreement. (Further commotion. THE CHAIRMAN ruled that the statement was not out of order). The

trouble with Mr. Prosser's text was that he had not disagreed with it nearly enough. (Cries of "Treason!") Caesar had his Brutus, Charles the First his Cromwell, and the Restatement of Torts might profit by their example. If this be Treason, make the most of it. (THE CHAIRMAN appealed for order, and with the assistance of the police it was restored).

His chief objection to the book was that the author appeared to be obsessed with the naive idea that there were such things as rules, doctrines, concepts, principles and theories of Tort law, which not only controlled the judge's decision in many cases, but were even of service and utility to the lawyer in predicting what a court might do with a given set of facts. This antiquated, discredited and exploded notion was simply contrary to fact. No one ever knew what a court might do, least of all the court. The choice of doctrine was largely a matter of personal preference and the comfort of articulation which one word-mechanism offered over its competitors. The first thing to do on reading any Torts case was to look around for some reason not stated in the opinion to explain why the judge jumped east instead of south. Nowhere in this book did he find any adequate recognition of the interplay of expressed and unexpressed factors, together with the elements of morals, administrative convenience, capacity to bear loss and prevention or prophylaxis, which went to make up that fascinating puppet show known as the Judicial Process. Nowhere did he find any consideration of the problems of the judicial system, its organization and functions, with particular emphasis on the allocation of powers to its several units, or of the bulkiness, cumbersomeness, expensiveness, crudeness, and perhaps stupidity, and above all the drama, of such a device for settling disputes. Tort decisions could not be made a matter of doctrine or precedent; there was no substitute for the intelligent passing of judgment. It was this element of chance, of the hunch, of the rolling of the little white dice, which made Torts so much fun. Mr. Prosser had taken all the fun out of it and made it a dead and lifeless thing.

He of course disagreed with Professor Harper; there were not nearly enough references to cases. Tort cases were far more important than Tort theory, and the more cases one read the sooner one achieved that pleasant state of bewilderment and confusion which was indispensable to an understanding of the law of Torts. So far as proximate cause was concerned— (Further uproar and another fight. PROFESSOR CLARENCE MORRIS of

Texas was taken to the office for first aid). So far as proximate cause was concerned, it was really very simple. It was now agreed by nearly everyone of consequence that the problem was best dealt with under the duty concept. The only question was whether the particular rule of conduct to be invoked was designed to afford protection to the interest of the plaintiff which had been invaded against the hazard which had materialized. Since the court could always invoke practically any rule it wanted to, this made it very easy. (An interruption by PROFESSOR PAUL A. LEIDY of Michigan was ruled out of order). Mr. Prosser had introduced a lot of complications in the forms of intervening causes and foreseeable and unforeseeable results, which so far as he could see were of no value. He found it difficult to understand them, and suspected after reading the chapter that Mr. Prosser did too. Parts of the book were as obscure as an opinion of the Supreme Court of Pennsylvania.

He could not but regret the extreme bias in favor of the defendant with which the book was permeated. In conclusion, he wished merely to say that he was glad that the book was now published, because Mr. Prosser would henceforth be able to turn his talents to something useful.

PROFESSOR LYMAN P. WILSON, of Cornell, said that he had read two or three chapters of the book, and could not agree that it was a total loss. He thought it should at least fertilize the mind of the student.

PROFESSOR CHARLES E. CARPENTER, of Southern California, said that he had frequently had occasion to disagree with Mr. Prosser in the past, and it was a pleasure to be able to do so again. He had read portions of the book, and had been disturbed to note here and there a degree of flippancy toward Tort law, which was too serious a matter to be treated with unseemly levity. The book no doubt had its merits, but it was full of glaring deficiencies. It displayed throughout a most unfortunate tendency to discard established rules and doctrines in favor of vague and undefined considerations of policy which seemed to make the decision of cases virtually a judicial lottery. He regretted to say also that it was marred by repeated and flagrant instances of ostensibly significant but at bottom unsound conclusions based upon obviously fallacious reasoning. Like the image of Nebuchadnezzar, there were parts of the text which had heads of gold supported by feet of clay. Sometimes even the heads were of brass. For ex-

ample, in the sections devoted to the doctrine of *res ipsa loquitur*—which, by the way, were in his opinion much too brief to do justice to the importance of the topic—the author persisted in adhering obstinately to the idea that the doctrine was nothing more than a matter of circumstantial evidence, with whatever probative value that evidence might have, rejecting the clearly preferable view which had been called vigorously to his attention, that *res ipsa loquitur* is in reality a non-probative presumption, an instrument of policy designed to elicit the disclosure of information where that is justified by the inherent probabilities of the situation.

Again, as to proximate cause—(Renewed disturbance in the hall. THE CHAIRMAN threatened to adjourn the meeting)—as to proximate cause, Mr. Prosser had very grossly over-simplified the problem, and seemed to accept the untenable idea that it was all a question of duty. He had most inexcusably failed even to mention such important factors as dependent and independent intervening interventions, intervening omissions, intervening checking forces, and much of the rest of the mechanism of causal sequence. For example, suppose that *A*, a blind man, is carrying a box of dynamite across a crowded intersection, while two hundred feet away there is a collision between the negligently driven automobiles of *B* and *C*. At the same time *D*, in a near-by store window, is negligently handling a cylinder full of poison gas and a rifle improperly manufactured by *E*, while *F*, a workman, is dropping a plank into the hold of a ship which, unknown to him, is full of gasoline vapor, and *G*, a conductor, is assisting a passenger carrying a package of fireworks to board a street car. When the bullet from the rifle strikes a fender flying from the automobile collision and deflects it into the dynamite—(Violent uproar. An unidentified<sup>1</sup> delegate from Louisiana rushed the platform, but was stopped and ejected. In the ensuing fracas PROFESSOR CARPENTER was slightly injured, and withdrew. The Chief of Police took the platform and said that if order could not be maintained he would break up the meeting).

PROFESSOR LAWRENCE VOLD, of Nebraska, said that he was reading the book, but preferred to reserve his comments until such time as he had finished it, if ever. He might say, however, that the writer's views on strict liability for defamation, particularly by radio, were all wrong. The correct law, of course, was

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1. Editor's note: Publication in the REVIEW does not imply agreement with the views expressed in any of the contributions. See *supra* p. 107.



set forth in the leading case of *Sorensen v. Wood*, 123 Neb. 348. He was confident that American legal scholarship was capable of producing a much better book on Torts in the near future.

PROFESSOR HARRY SHULMAN, of Yale, said that he had started to read the book, but had encountered in the chapter on interference with commercial relations such a pronounced bias against labor unions, amounting to extreme economic royalism, that he had found himself unable to continue.

PROFESSOR CHARLES O. GREGORY, of Chicago, said that he had read only one section of the book, dealing with what the author called the problem of the "unforeseeable plaintiff" and the case of *Palsgraf v. Long Island R.R. Co.* (Uproar, boos and hisses, with further warning from the Chief of Police). With that section he entirely disagreed. He was sure that the author had misread the *Palsgraf Case*, and that Judge Cardozo would not have said anything so foolish as that the defendant would be liable for unforeseeable consequences to a person whom his conduct had threatened with foreseeable harm, but not for the same consequences to a person not so threatened. Cardozo was a better judge than that. The proper interpretation of the case had been set forth in a very fine article in the *University of Chicago Law Review*. He had been informed that the author favored both comparative negligence and contribution among tortfeasors, which might be considered a redeeming feature, but what he had seen of the book was not of a character to inspire confidence in the rest of it.

PROFESSOR CLARENCE M. UPDEGRAFF, of Iowa, said that too much was being written on Torts anyway. (Applause). His own feeling, after examining the chapter on interference with contract, was that the author was so violently prejudiced in favor of union labor that his views on any other topic must be open to question. Perhaps it was going too far to call him a Communist, but he was certainly open to the accusation of being a New Dealer.

PROFESSOR W. PAGE KEETON, of Texas, said that he did not think the author had done full justice to the subject of Misrepresentation, which was of supreme importance and entitled to more space—although it must be admitted that he had cited a number of very excellent articles, to which the reader might refer for a better discussion of the law. Mr. Prosser had, moreover, overlooked a number of very fine Torts cases in the Texas Courts of Civil Appeals. He wished to say, however, that he thought that

the book was printed in very nice type, and was very beautifully bound.

PROFESSOR FLEMING JAMES, JR., of Yale, said that he thought the book was not altogether bad on the subject of the last clear chance, which the author properly recognized as a transitional doctrine, with appropriate reliance on the leading authority. But he could only view with alarm the approval given to contribution among tortfeasors, which entirely failed to take into account the realities of personal injury practice and liability insurance. He believed that a few more years in a law office would do the writer a world of good.

PROFESSOR LAURENCE W. DE MUTH, formerly of Colorado, said that he had not read the book, but that he was sure it was no good.

PROFESSOR CLARENCE MORRIS, of Texas, who had returned to the hall, said that when he had first looked at the book he had thought that it might be a pretty good one. (Disturbance, and cries of "No, no, a thousand times no!") However, after a more thorough examination, he had become convinced that it was superficial. (A VOICE: Ataboy!) The author, he thought, had attached too much importance to the subject of proximate cause—(Cheers)—and not enough to independent contractors, retraction in newspaper libel, and punitive damages, together with the highly significant function of the law of Torts as an instrument of prevention and punishment. Possibly he might do better in a second edition, which no doubt would appear in the course of a few months. With malice toward none, and charity even for Torts writers, he was willing to reserve judgment until then.

PROFESSOR WILLIAM L. PROSSER, of Minnesota, said that he was very sorry, that he greatly regretted the whole matter, and that he would never do it again.

With the assistance of the police, the meeting then adjourned. Two persons, whose names could not be ascertained, were injured, although not seriously, in the doorway leading to the bar.

WILLIAM L. PROSSER\*

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\* Professor of Law, University of Minnesota.